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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 616

DUNCAN MILLER, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 18–19) is reported at 307 F. 2d 676. The district court wrote no opinion.

JURISDICTION

The court of appeals entered judgment against petitioner on July 26, 1962, and denied his timely petition for rehearing on September 17, 1962. Petitioner filed his petition for a writ of certiorari on November 26, 1962, invoking the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Mineral Leasing Act provides that the Secretary of the Interior shall award oil and gas leases to

"the person first making application for the lease who is qualified to hold a lease under this Act * * *." In each instance at issue here, petitioner's application followed one by a person who had previously held such a lease for the land and had relinquished it.

The question presented is whether the Secretary properly rejected petitioner's applications on the ground that he was not the first qualified applicant.

STATUTES AND RULES INVOLVED

The pertinent provisions of the Mineral Leasing Act of 1920 and the Regulations Relating to Public Lands of the Department of the Interior are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

Petitioner filed several applications for oil and gas leases of public lands pursuant to the Mineral Leasing Act of 1920 (see Appendix A, *infra*, pp. 11–12). In each instance petitioner's application was subsequent to an application filed by a person who had previously held an oil and gas lease to the land but had relinquished it. The Secretary of the Interior rejected each of petitioner's applications on grounds that he was not the first qualified applicant. Petitioner had unsuccessfully appealed these rejections contending that the earlier applicants were not "qualified" applicants for the land covered by the relinquished leases because they were themselves the relinquishing lessees.

The contention calls into question the statutory provisions for the award of oil and gas leases established by the Mineral Leasing Act of 1920 and the public lands regulations issued pursuant thereto.

Section 17 of the Act (App. A., *infra*, p. 31) authorizes the Secretary of the Interior to lease public lands for the drilling of oil or gas to "the person first making application * * * who is qualified to hold a lease under this Act * * * ." Section 1 of the Act (App. A, *infra*, p. 17) specifies that leases may be granted to citizens, associations of citizens, corporations organized in the United States or municipalities. The leases run for a stated term of years but will be continued beyond that term so long as oil or gas is produced in paying quantities (Pet. 4).

Under Section 30(b) of the Act (App. A, *infra*, p. 12) the holder of an oil or gas lease may relinquish his rights under the lease at any time. Thereupon the land included in the lease becomes subject to the filing of new lease applications. 43 C.F.R. 192.43 (App. A, *infra*, p. 12). Under the regulations in effect when petitioner's applications were filed (since changed by amendment in December 1959 (see, *infra*, pp. 6–7)), new lease offers could be made "immediately upon the notation of the cancellation or relinquishment on the tract book of the land office * * *." 43 C.F.R. 192.43 (1954 ed.) (App. A, *infra*, p. 12). Customarily, these notations were made during the hours before 10:00 a.m. or after 3:00 p.m. when the land offices are closed to the public. Members of the general public could learn of the availability of relinquished land for new lease offers when the land office first opened following notation on the tract book of the relinquishment of a former lease. Relinquishing lessees frequently applied for new leases on the same land to try to extend the length

of time the land would remain under their control, or to take advantage of low rental rates in the early years of a lease. Prior to 1960, the second and third years were rent-free. When notation on the tract book was made on the day of the relinquishment, as here, then the notation was likely to be the first actual notice to persons other than the relinquishing lessee that there had been a relinquishment, as well as being formal notice of the land's renewed availability for lease.[1]

Petitioner filed a number of offers under the pre-December 1959 regulation to lease lands on which leases had been relinquished, but the land office managers rejected each of these offers because of the existence of prior applications by the relinquishing lessees. In appealing these rejections, petitioner has argued that the prior lessee's knowledge that he had relinquished his lease gave him an unfair advantage over members of the general public in that he alone knew that his relinquishment was going to be noted on the tract book and that the land would become available for lease.

Both the Director of the Bureau of Land Management and the Secretary of the Interior affirmed the rejection of petitioner's offers, relying on an earlier

[1] More frequently, the notation on the tract book would not be made until a few days after the relinquishment was filed with the land office. In such cases, persons other than the relinquishing lessee could obtain actual notice of the relinquishment and coming availability of the land from the public serial register in the land office on which relinquishments are recorded.

decision (A-27620, July 28, 1960) [2] in which the Secretary had considered and rejected petitioner's contentions. In that decision, after examining the qualifications for an applicant set out in Section 1 of the Mineral Leasing Act (App. A, *infra*, p. 11), and in his own regulations, 43 C.F.R. 191.3 (App. A, *infra*, p. 12), the Secretary held that there was nothing in either of them disqualifying a relinquishing lessee from applying for a new lease, and that applicants are entitled to rely on the statute and regulations as they stand at the time of application. He concluded (App. B, *infra*, p. 18):

> Elementary considerations of proper administrative procedure require that prospective lease applicants shall be entitled to rely upon the language of the statute and the regulations as they are written, without the necessity for speculation on the possibility that an administrative officer may decide, in the processing of a particular offer, that more stringent qualifications than those presently in existence should be imposed. If the appellant is correct in his conclusion that a relinquishing lessee ought not be eligible for a new lease in circumstances which forbid an extension of his old lease, it is reasonable to suppose that the need for such rule will become apparent to those who administer the law or to those who seek to benefit by its provisions and appropriate

[2] This decision, which was attached to the complaint in the present case, is printed as Appendix B, *infra*, pp. 14–18. Petitioner has appealed precisely this same point to the Secretary more than 20 times. The Secretary has rejected each of these on the basis of that first decision.

> action will be taken to adopt such rule, either by amendment of the statute or amendment of the regulations. But, until such action is taken so that all may be informed of such rule, it is necessary to recognize that there is nothing which forbids the award which was made in this case. * * *

Petitioner then brought the present action, asking the district court to set aside the Secretary's decisions, order cancellation of all leases awarded to relinquishing lessees, and order that he be awarded leases wherever the court should find him to be the first qualified applicant. The district court granted summary judgment for the Secretary (Pet. App. 21) and the court of appeals affirmed (Pet. App. 18–19).

ARGUMENT

The issue presented by the petition is of no general importance since an amendment to the public lands regulations adopted in 1959 meets petitioner's objections to the administrative procedures. There is no conflict of decisions and no cause for further review.

1. Essentially, petitioner's complaint is that the long established system by which the priority of applications for mineral leases has been determined—known as "the tract book rule"—operated unfairly where the Department of the Interior made lands covered by relinquished leases available for leasing. He contends that notation of a relinquishment on the tract book did not give the general public sufficient notice to compete with the relinquishing lessees. On December 8, 1959, the Secretary amended the regulations to require that notices of relinquishments

and other terminations be posted in the land office on the third Monday of each month, that these notices state that the lands involved are "subject to simultaneous filings of lease offers" until the fifth working day thereafter, and that priorities among simultaneous offers be determined by public drawing. 24 Fed. Reg. 9846, 43 C.F.R. 192.43 (1962 Supp.) (App. A, *infra*, p. 13). This change of the regulations to insure all persons at least four days notice deprived this case of prospective effect and any general importance.[3]

2. In any event, there is no merit to petitioner's contentions.

a. Petitioner argues that the relinquishing lessees are not "qualified" to apply for oil and gas leases. However, he does not once refer to the provisions of the Mineral Leasing Act and the public lands regulations which state who is qualified to hold such leases without making the exception which petitioner would have the courts read into them. Section 1 of the Mineral Leasing Act (App. A, *infra*, p. 11) and the regulation implementing it, 43 C.F.R. 191.3 (1954 ed.) (App. A, *infra*, p. 12), both enumerate the classes of applicants eligible for such leases—citizens of the United States, associations of such citizens, corporations organized in the United States and municipalities. They make no exception for relinquishing lessees and there is no prohibition to be found elsewhere

[3] It should be noted that the revised regulation is being challenged in *Thor-Westcliffe Development, Inc.* v. *Udall* (C.A. D.C., No. 17101), argued December 10, 1962, on the ground that the four-day period for simultaneous applications violates the direction of Section 17 of the Act that leases be awarded to the person "first making application."

against the award of leases to relinquishing lessees. Nor is there any provision in the statute which could reasonably be read as compelling the Secretary to exclude a relinquishing lessee from among the classes of persons who are eligible to file for relinquished land. Under the circumstances, the courts below properly held that the Secretary was acting within his discretion in refusing to read into the Act an exception for relinquishing lessees which would render persons made eligible by the terms of the Act ineligible and result in an award to applicants whose offers were not first in time.

b. The tract book rule to which petitioner would make exception has long been accepted as one giving "equal opportunities to all applicants." *Germania Iron Co.* v. *James,* 89 F. 811, 815 (C.A. 8), appeal dismissed, 195 U.S. 638. For over 70 years, notation on the tract book (the basic local public lands document) has been deemed a fair way to notify the public at large that land is available and to minimize the advantage of those with special information. The fact that petitioner believes that the rule should be modified when applied to the relinquishment situation does not override the Secretary's judgment in the past that a specific exception was not warranted. The long period of time during which the Secretary has applied the general practice of notation in the tract book to the relinquishment situation, and petitioner's failure to point to a single case wherein this issue has been raised, let alone to a decision in conflict with those of the courts below, strongly indicate that the system not only complies with the statute but has not been deemed

to have operated unfairly.[4] Petitioner asks retroactive application of his version of what the rule should have been to the detriment of those who complied with the rule as it stood. Such a retroactive substitution of a different regulation as sought by petitioner would be an unwarranted penalty against those who followed the existing rules. To the extent that the rule, although authorized by statute, has presented practical administrative problems, they are properly the responsibility of the Secretary and he has acted to resolve them by amendment of the regulations.[5]

3. Should the petition be granted, the Secretary of the Interior reserves the right to make the additional argument, urged but not ruled upon below, that dismissal of petitioner's suit was proper because of the absence of the lessees, who are indispensable parties.

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[4] A stipulation in the record before the courts below (Jt. App. 29–32) shows that, of the 29 applications on which petitioner originally filed suit, only five were filed within 15 days of the date of notation on the tract book and in three of those five instances the successful applicant was not the relinquishing lessee. In the other 24 instances, petitioner's delay ranged from 19 days to 14 months. Thus, petitioner's charge of unfairness is not proven by the facts of his case. Indeed, it would be difficult to imagine a system which would protect an applicant so consistently late.

[5] Neither the facts nor the issues in *Boesche* v. *Udall*, 303 F. 2d 204 (C.A. D.C.), certiorari granted, November 5, 1962, No. 332, this Term, or *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (C.A. D.C.), on which petitioner relies (Pet. 12–15), are similar to those presented here. Accordingly, neither case affords a basis for this Court to review the decisions below.

There is no basis for petitioner's contention (Pet. 15) that the decision of the court of appeals herein "seriously restricts the authority of the Secretary of the Interior to cancel a lease * * *."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX
Solicitor General.
S. BILLINGSLEY HILL,
HUGH NUGENT,
Attorneys.

JANUARY 1963

APPENDIX A

Section 1 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. 181, *et seq.*, provides in pertinent part as follows:

> That deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States [with certain exceptions] shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

At the times petitioner made his lease offers, Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, 443, as amended by the Acts of August 8, 1946, 60 Stat. 950, 951 and July 29, 1954, 68 Stat. 583, 584, 30 U.S.C. 226, read in pertinent part as follows:

> All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act

shall be entitled to a lease of such lands without competitive bidding. * * *[1]

Section 30(b) of the Mineral Leasing Act of 1920, added by the Act of August 8, 1946, 60 Stat. 950, 956, 30 U.S.C. 187b, provides in part:

> * * * [A] lessee may at any time make and file in the appropriate land office a written relinquishment of all rights under any oil or gas lease * * *. Such relinquishment shall be effective as of the date of its filing * * *.

Part 191 of Title 43 of the Code of Federal Regulations sets forth the general regulations applicable to mineral permits, leases and licenses. 43 C.F.R. 191.3 (1954 ed.) provides:

> § 191.3 *Who may hold leases and permits.* Mineral prospecting permits and mineral leases may be issued only to (a) citizens of the United States; (b) associations of such citizens; (c) corporations organized under the laws of the United States or of any State or Territory thereof; or (d) in the case of coal, oil, oil shale, or gas, municipalities. A mineral lease or permit will not be issued to a minor but oil and gas leases may be issued to legal guardians or trustees of minors in their behalf.

Part 192 of Title 43 of the Code of Federal Regulations sets forth the regulations pertaining to oil and gas leases. At the times of petitioner's lease offers, 43 C.F.R. 192.43 (1954 ed.) provided in part:

> § 192.43 *Opening of lands to further filings, where a noncompetitive oil and gas lease is canceled or relinquished.* Where a noncompetitive lease is canceled or relinquished and the lands involved are not on the known geologic structure of a producing oil or gas field or are

[1] Noncompetitive leases were then granted for a primary term of five years. They could be extended for as much as five years in the absence of production.

not withdrawn from further leasing, immediately upon the notation of the cancellation or relinquishment on the tract book of the land office or on the tract book of the Bureau of Land Management, if there is no land office for the State, the lands shall be open to further oil and gas lease offers. * * *

Section 192.43 was amended on December 8, 1959, 24 Fed. Reg. 9846, to provide in pertinent part as follows, 43 C.F.R. 192.43 (1962 Supp.)[2]:

(a) Lands in cancelled or relinquished leases * * * shall be subject to the filing of new lease offers only after notation on the official record of the cancellation, relinquishment, or termination of such lease and only in accordance with the provisions of this section. * * *

(b) On the third Monday of each month * * *, the authorized officer of the Bureau of Land Management will post on the bulletin board in each land office a list * * * of the lands in leases which expired, were cancelled, relinquished in whole or in part, or terminated and which will become subject to leasing at 10 o'clock a.m. on the fifth working day thereafter together with a notice stating that the lands in such leases are subject to simultaneous filings of lease offers from the time of such posting until 10 o'clock a.m. on the said fifth working day thereafter.

* * * * *

(d) If more than one offer to lease all or any part of the acreage covered by an expired, cancelled, relinquished, or terminated lease is filed during the period provided for in paragraph (b) of this section, their priorities will be determined by a public drawing in accordance with § 295.8 of this chapter.

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[2] 43 C.F.R. 192.43 was also amended on March 24, 1955, 20 Fed. Reg. 1778, and August 29, 1957, 22 Fed. Reg. 6967. Neither of these amendments relate to the issues of this case.

APPENDIX B

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D.C.

A-27620 July 28, 1960

Duncan Miller

: Sacramento 052316.
: Oil and gas lease offer rejected.
: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management, dated November 22, 1957, which affirmed the decision of the manager of the land office at Sacramento, California, dated September 10, 1956, rejecting his noncompetitive oil and gas lease offer, Sacramento 052316, because of a conflict with a prior offer, Sacramento 052120, pursuant to which a lease was issued on that day, effective as of October 1, 1956.

The record in this case discloses that L. N. Hagood had previously held an oil and gas lease on all the lands included in the appellant's offer to lease. On April 17, 1956, Mr. Hagood relinquished his lease and on April 18, 1956, filed an offer for oil and gas lease on the same lands. The appellant filed his offer on May 25, 1956. The status reports on the lands in question include notation that the lands were previously included in an oil and gas lease (Hagood's) which was cancelled on relinquishment on April 17,

1956, at 4:15 P.M., and that an oil and gas lease offer for the land was filed on April 18, 1956. The manager rejected the appellant's offer on September 10, 1956, because of the prior conflicting offer and issued a new lease to Mr. Hagood on that date.

In his appeal to the Director of the Bureau of Land Management, the appellant asserted that Mr. Hagood's relinquishment of his lease was a sham. He alleged that since the lease was in its final extended term, Mr. Hagood utilized the relinquishment to enable him to obtain a new lease and thus acquire a perpetual monopoly. On appeal to the Department, he argues that Mr. Hagood was not qualified because he was attempting to evade the Mineral Leasing Law.

In his answer, Mr. Hagood asserts that he is a native born citizen of the United States and thus fully qualified to acquire and hold an oil and gas lease under the applicable law since there is no public land law, regulation or policy which prohibits a former non-competitive oil and gas lessee from lawfully acquiring a new lease on the same land. He asserts that he might have accomplished the same result by requesting a lease in the name of a dummy or nominee, but that he prefers an open and honest transaction in his own name.

From the record presented, it appears that Mr. Hagood's previous lease was relinquished and the fact of such relinquishment was duly noted on the tract book in the land office so that the land became available for leasing once more, before the Hagood offer, which antedates the appellant's offer, was filed and that the appellant recognizes this state of affairs. The question thus presented by this appeal is simply whether Mr. Hagood was disqualified as an applicant for an oil and gas lease because he held the previous lease on the same land.

Section 1 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 181), specifies that lands owned by the United States shall be subject to disposition, including leasing, to

> citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. * * * Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

The Department's regulations recognize the entities enumerated in the statute as proper holders of mineral prospecting permits and mineral leases and add:

> * * * A mineral lease or permit will not be issued to a minor but oil and gas leases may be issued to legal guardians or trustees of minors in their behalf. (43 CFR 191.3)

The Mineral Leasing Act also provides that when lands to be leased are not within any known geological structure of a producing oil or gas field, as in this case,

> the person first making application for the lease who is qualified to hold a lease * * * shall be entitled to a lease of such lands without competitive bidding. (Sec. 17; 30 U.S.C., 1952 ed., Supp. V., sec. 226).

In cases of cancellation or relinquishment of a previous lease, the regulations of the Department provided at the time when Mr. Hagood's lease was relinquished.

> Where a noncompetitive lease is cancelled or relinquished and the lands involved are not on the known geologic structure of a producing oil or gas field or are not withdrawn from further leasing, immediately upon the notation of the cancellation or relinquishment on the tract book of the land office * * * the lands shall be open to further oil and gas lease offers. (43 CFR 192.43).

The appellant does not deny that the lands covered by his lease offer were available for leasing following notation of termination of the Hagood lease and questions only the qualification as an officer of the person to whom the lease was awarded because of his earlier lease of the same lands. His objection to the lessee's qualification arises from his fear that if the practice of awarding a new lease to a lessee who relinquishes his existing lease because it is not subject to renewal is recognized, monopolistic control of mineral lands which is at variance with desirable public policy may result. Thus, in essence, the appellant contends that the lessee is unqualified, not because of any expression of public policy contained in the applicable statute or the regulations of the Department, but because he feels that as a matter of desirable public policy the former lessee ought not to be regarded as qualified.

It is possible that there is some merit in the appellant's judgment on desirable public policy. It is a fact, however, that the Congress has not declared that new leases may not be awarded to lessees upon their relinquishment of existing leases for the same lands. Nor has the Secretary of the Interior, in the exercise of the discretion vested in him by the Mineral Leasing Act, determined that leases shall not be awarded to relinquishing lessees. In the absence of such action by the Congress or the Department, there is no basis

for an attempt to read into the existing statute or the regulations a requirement of this nature. Elementary considerations of proper administrative procedure require that prospective lease applicants shall be entitled to rely upon the language of the statute and the regulations as they are written, without the necessity for speculation on the possibility that an administrative officer may decide, in the processing of a particular offer, that more stringent qualifications than those presently in existence should be imposed. If the appellant is correct in his conclusion that a relinquishing lessee ought not be eligible for a new lease in circumstances which forbid an extension of his old lease, it is reasonable to suppose that the need for such rule will become apparent to those who administer the law or to those who seek to benefit by its provisions and appropriate action will be taken to adopt such rule, either by amendment of the statute or amendment of the regulations. But, until such action is taken so that all may be informed of such rule, it is necessary to recognize that there is nothing which forbids the award which was made in this case. See *M. A. Machris, Melvin A. Brown*, 63 I.D. 161 (1956).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F.R. 6794), the decision of the Acting Director of the Bureau of Land Management is affirmed.

(Sgd) EDMUND T. FRITZ,
Acting Solicitor